Supreme Court, U.S.
FILED
APR 25 1994
OFFICE OF THE CLERK

(3)

No. 93-1281

In The

Supreme Court of the United States

October Term, 1993

AUBURN POLICE UNION, et al.,

Petitioners,

v.

MICHAEL E. CARPENTER, ATTORNEY GENERAL OF THE STATE OF MAINE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

PETITIONERS' REPLY MEMORANDUM

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April 25, 1994

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PETITIONERS' REPLY MEMORANDUM

I.

The Maine Attorney General, in his brief in opposition, addresses the question of "substantial overbreadth" and refers to the Maine statute's "hypothetical" application to solicitations by "private citizens unconnected with the police." (Brief in Opposition, pp. 10-11.) However, such an application is not merely hypothetical. Contained in the Joint Appendix on appeal to the First Circuit (at pp. 114-118) and also attached to the Stipulated Facts submitted to the District Court below, was the affidavit of a

Maine citizen, Ralph Midgett. (A copy of which is reproduced herewith in the Appendix.)

In his Affidavit, Mr. Midgett describes his efforts to create a fund to purchase bullet-proof vests for the Portland Police Department through private donations. Mr. Midgett states that contributions to the fund were made freely, without coercion, and no telethon or direct mail campaign was undertaken or necessary. (Appendix, p. 2a.) He states that contributions were made in response to the information conveyed by local newspaper articles. (*Id.*)

Mr. Midgett further states that the only record of contributors was kept by him alone, and that no police officer or organization indicated any interest in knowing who had or had not contributed, and that there would never be any arrangement to share that information with the police.

Mr. Midgett states in his affidavit that after speaking with the Attorney General's office, "the viability of the police vest fund itself appears to be in jeopardy because of the broad sweep of 25 M.R.S.A. § 3702."[1] (*Id.* at p. 3a.) Finally, he asserts that "because of the statute . . . my freedom to speak (about the fund) is severely chilled, if not outright prohibited." (*Id.*)

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[1] The Ralph Midgett affidavit was actually propounded and filed in the previous litigation, *Auburn Police Union v. Tierney*, 756 F. Supp. 610 (D. Me. 1991). However, the parties in this case ("Auburn II") attached the Midgett affidavit to their Stipulated Facts and agreed that Mr. Midgett "would testify as set forth in his affidavit."

Mr. Midgett's affidavit and experiences plainly illustrate the broad sweep of the prohibition against police solicitation. It is not a mere hypothetical, but the real life experience of a Maine citizen with the application of the statute. Although the fund was managed by a private citizen, and there was no solicitation or appeal for support, and although police officers would never know the identity of the contributors, the activity was still prohibited by the challenged statute.

Respondent in his brief states that the "district court specifically rejected these arguments in concluding that such solicitations did indeed create the risk of inherent coercion." (Brief in Opposition, p. 10.) However, this is not strictly accurate. The district court actually found that the prohibition was permissible because it countered "the pressure to acquire a public reputation of having financially supported the police." 798 F. Supp. at 825. The distinction is an important one, because the statute was upheld on the basis of a governmental purpose which the state has not asserted. In short, the district court's reasoning undermines the rule of strict scrutiny, by fabricating additional governmental interests not asserted by the state. The First Circuit also characterized solicitations by private citizens as "hypothetical" and seemed to disregard the existence of the Midgett affidavit in the Joint Appendix. 8 F.3d at 895.

II.

Respondent in his Brief in Opposition asserts that the First Circuit was bound by the summary dismissal of *State of Maine v. Maine State Troopers Ass'n*, 491 A.2d 538

(Me. 1985), *appeal dismissed*, 474 U.S. 802 (1985) ("*MSTA*") based upon this court's holding in *Hicks v. Miranda*, 422 U.S. 332, 343-45 (1975) and *Mandel v. Bradley*, 432 U.S. 173 (1977). Petitioners believe that the First Circuit was not so constrained. Inasmuch as § 3702-A sweeps within its proscription even spontaneous acts of independent citizens such as Ralph Midgett which are intended to benefit law enforcement officers, it is understandable that Respondent finds support in the holdings of *Hicks* and *Mandel*. However, Petitioners do not believe that these cases are as broad in their holdings as Respondent, and the First Circuit Court of Appeals, would assert. The limited scope of the precedential effect of summary dispositions was cogently summarized by this Court in *Washington v. Yakima Indian Nation*, 439 U.S. 463 (1979), *reh'd denied*, 440 U.S. 940 (1979):

> Our summary dismissals are, of course, to be taken as rulings on the merits, *Hicks v. Miranda*, 442 U.S. 332, 343-345, 95 S. Ct. 2281, 2288-2289, 45 L.Ed.2d 223, in the sense that they rejected the "specific challenges presented in the statement of jurisdiction" and left "undisturbed the judgment appealed from." *Mandel v. Bradley*, 432 U.S. 173, 176, ___ S. Ct. 2238, 2240, 53 L.Ed.2d 199. They do not, however, have the same precedential value here as does an opinion of this Court after briefing and oral argument on the merits, *Eidelman v. Jordan*, 415 U.S. 651, 670-671, 94 S. Ct. 1347, 1359-1360, 39 L.Ed.2d 662; *Richardson v. Ramirez*, 418 U.S. 24, 53, 94 S. Ct. 2655, 2670, 41 L.Ed.2d 551. A summary dismissal of an appeal represents no more than a view that the judgment appealed from was correct as to those federal questions raised and necessary to the

> decision. It does not, as we have continued to stress, *see*, e.g., *Mandel v. Bradley, supra*, necessarily reflect our agreement with the opinion of the court whose judgment is appealed. It is not at all unusual for the court to find it appropriate to give full consideration to a question that has been the subject of previous summary action.

Id. at 477, n.20. Petitioners submit that not only have decisions from this Court since the dismissal in 1985 of the appeal in *MSTA* "broken new ground," but in addition both the issues and facts presented in *MSTA* and in the case at bar diverge markedly. Of particular importance is the critical variable of "compelling governmental interest," the foundation essential to the decision of the Maine supreme judicial court in *MSTA*. Even if the First Circuit was correct in its application of *Hicks*, Petitioners urge that the resulting vindication of a statute so obviously repugnant to fundamental First Amendment values, suggests that re-visitation of the *Hicks* doctrine may be appropriate.

III.

Respondent in his brief asserts that since Maine is the only state in the union with such a broad prohibition on solicitations by or on behalf of law enforcement officers, the statute therefore has no "broad national effect." (Brief in Opposition, p. 15.) Respondent further argues that "in the sixteen plus years since the enactment of the Maine statute, Maine's legislation has retained its unique status." (*Id.*) This latter statement disregards the experiences of New Jersey with a similar statute in *Telco Communications v. Barry*, 731 F. Supp. 670 (D. N.J. 1990).

Respondent's premise also disregards the fact that the *amici curiae* in the First Circuit case below were, in addition to the Maine State Troopers Association, the National Association of Police Officers, a non-profit organization of the District of Columbia which represents approximately 135,000 state and local law enforcement officers; the National Troopers Coalition, an unincorporated association with principal offices in Albany, New York, which represents approximately 40,000 state troopers throughout the United States; and the Texas State Troopers Association, a non-profit corporation based in Austin, Texas consisting of approximately 2,050 members who are Texas state police.

Not only does the presence of these *amici* in the First Circuit below indicate the broad national effect of such a statute, but the acute public interest in all such legislation. The constitutionality of a state statute which prohibits fully protected speech would certainly seem of national importance. Even if local in its purview, the statute would have national effect upon any law enforcement group, such as the *amici* below, conducting a nationwide campaign for public support. Such national groups would simply not be able to telephone or mail into the state of Maine with an appeal for public support.

Accordingly, the statute, and the issues presented by this case, are of broad national impact.

Kansas City, Missouri
April 25, 1994

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MAINE

AUBURN POLICE UNION, et al., Plaintiffs,	)	
v.	)	Case No. 90-0042 P
JAMES TIERNEY, Defendant.	)	

AFFIDAVIT OF RALPH MIDGETT

NOW COMES the affiant, under oath, and deposes and states as follows:

1. My name is Ralph Midgett. I am a resident and businessman in the Portland area, and since the autumn of 1989, I have been receiving public donations to a police vest fund.

2. My involvement in the fund was triggered by an article in the Portland Press Herald, written by Martha Englert, which reported that Portland police officers had begun paying for bullet-proof vests out of their own pockets because there was insufficient money in the budget to supply such vests at city or police organization expense.

3. That the policemen who protect us should thus also have to protect themselves bothered me, as it did others, and I contacted Martha Englert to tell her so.

4. Subsequently, Martha Englert wrote two follow-up articles (attached and made a part hereof as Exhibits 1 and 2), and the police vest fund came into being.

5. Individual and business contributions to the fund have been made freely, without coercion. No telethon or solicitation-by-mail campaign has been undertaken or been necessary. Rather, contributions have been made largely in response to the information conveyed in and by the above-described Press Herald articles.

6. The police vest fund exists solely for the purpose of buying bullet-proof vests for members of the Portland Police Department. The total cost of these vests – and the goal of this fund – is approximately $50,000.

7. One hundred percent of all contributions to the fund are going directly into the purchase of bullet-proof vests. In acknowledging each contribution, I have paid for stamps, envelopes, and enclosed acknowledgments myself. There neither have been nor will be any arrangement to reimburse me, much less otherwise compensate me. These have not been offered to me, and they are not desired by me.

8. Records of contributors are being kept by me and me alone. No police officer, police association, or police organization has indicated any interest in knowing who has or has not contributed. There has not been and will not be any arrangement to share that information with the police.

9. Shortly before the turn of the year, 1990, the Attorney General's office was called to find out whether a donated hot tub could lawfully be raffled to raise money for the police vest fund.

10. After that call, I refrained from organizing or encouraging a raffle of the hot tub. Moreover, since that call, the viability of the police vest fund itself appears to be in jeopardy because of the broad sweep of 25 M.R.S.A. § 3702.

11. This fund seems to me a good and necessary thing – certainly more free and less costly than another increase in Portland's property taxes, which to me are already high enough. If it were not so, I would not have involved myself with it. But because of a statute, 25 M.R.S.A. § 3702, my freedom to speak of it or about it is severely chilled, if not outright prohibited.

12. Because the fund came into existence, the bullet-proof vests are scheduled to be purchased by the Portland police this spring. I would like to see the purchase happen, and I give this affidavit in support of the pending request for an injunction against enforcement of the Police Anti-Solicitation Law, 25 M.R.S.A. § 3207. The facts stated hereinabove are based on my personal knowledge.

Dated:

/s/ Ralph Midgett
Ralph Midgett

STATE OF MAINE
CUMBERLAND, SS. April 25, 1990

Personally appeared the above-named Ralph Midgett, under oath, and attested to the truth of the statements hereinabove.

Before me,

/s/ Nancy M. Roberge
Notary Public
Attorney-at-Law
Nancy M. Roberge

MY COMMISSION EXPIRES
JUNE 23, 1990